COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Notice of Inquiry Re: Billing Services	)	D.T.E. 01-28 (Phase II)

COMMENTS OF BOSTON EDISON COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY AND COMMONWEALTH ELECTRIC COMPANY, d/b/a NSTAR ELECTRIC

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I. INTRODUCTION

Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company, d/b/a NSTAR Electric ("NSTAR Electric"), hereby file the following comments on supplier billing in the above-referenced proceeding. On May 9, 2001, the Department of Telecommunications and Energy (the "Department") opened an investigation to consider developing rules and procedures by which competitive suppliers may bill both distribution and supplier services to customers via a single-bill option (the "NOI"). The NOI resulted from the Department's investigation of issues relating to metering, meter maintenance and testing, and customer billing and information services (collectively, "MBIS"), which was authorized and directed by the Legislature in Section 312 of the Electric Restructuring Act of 1997 (the "Restructuring Act"). See St. 1997, c. 164, § 312 ("Section 312").

Section 312 required the Department to investigate the issue of whether opening the provision of MBIS to competition would result in substantive savings to consumers with little or no disruption to distribution company employee staffing levels. Section 312 of the Restructuring Act also required the Department to report its findings to the

Legislature and prohibits the Department from allowing MBIS to be provided on a competitive basis absent legislative action. St. 1997, c. 164, § 312. Based on that investigation, the Department determined that billing-related services should not be provided through a competitive market because introducing competition for billing-related services: (1) would be complex to implement; (2) would not produce added benefits otherwise realized through the existing regulatory framework; (3) may not result in cost savings to customers; and (4) would result in significant disruptions in distribution company employee staffing levels. Report to the General Court Pursuant to Section 312 of the Electric Restructuring Act, Chapter 164 of the Acts of 1997 on Metering, Billing and Information Services, at 27-32 (December 29, 2000) (the "MBIS Report").

The Department opened this proceeding to consider whether terms and conditions for a single-bill option may be implemented by competitive suppliers within the existing statutory and regulatory framework. In addition, the Department is seeking comments regarding whether modifications should be made to the partial payment rules established in D.P.U./D.T.E. 97-65. Under existing guidelines, distribution companies that bill for both distribution service and for supplier services apply partial payments first to distribution service and, second, to competitively provided generation service. See Terms and Conditions, D.P.U./D.T.E. 97-65, at 54, 126 (1997).

Pursuant to the Department's procedural schedule, a technical session was held on June 7, 2001. At the conclusion of the technical session, the Hearing Officer sought comment or legal analysis on three issues raised by the participants: (1) the Department's legal authority to allow suppliers to bill customers for distribution and supplier services via a supplier single bill; (2) whether the Department's partial-payment rules should be

modified; and (3) whether distribution companies should be allowed or required to purchase the receivables of suppliers in order to facilitate debt collection and mitigate the bad debts of suppliers relating to generation service (Tr. at 183-186). Each of these issues is discussed below.

II. A SUPPLIER SINGLE BILL OPTION IS NOT PERMITTED UNDER THE RESTRUCTURING ACT

Historically, the billing of customers has been an integral customer-service component of distribution service because it provides the primary interface between the distribution company and its customers. As the supplier of regulated public-utility service, the distribution company has had the right and obligation to maintain a direct, retail relationship with its customers. The monthly bill is the primary, regular means of communication to customers by the distribution company, and the Department has recognized the importance of this relationship by promulgating detailed regulations governing all aspects of customer billing, including payment intervals, meter reading, termination protection, budget plans and complaint procedures. See 220 C.M.R. 25.00 et seq. Moreover, the Department's regulations include provisions governing the establishment of a customer of record for each new account, as a means to codify the direct relationship that customers of record have with their distribution company. Id. at § 25.02(10). The importance of the direct billing relationship between the distribution company and the customer is underscored by the fact that important customer information about rate changes, consumer rights, etc., are routinely required by the Department to be included in customer bills issued by distribution companies.

In the Restructuring Act, the Legislature recognized the importance of

maintaining the traditional billing relationship between distribution companies and their customers by requiring that distribution companies continue to bill customers directly for distribution service.[1] The Restructuring Act limits the options of distribution companies to distribute bills to customers, as follows:

> Not later than six months after [March 1, 1998], in order to promote customer choice and convenience in a restructured electricity and gas market, *distribution companies shall create and send bills to retail customers* pursuant to either of the following bill options: (1) single bill from the distribution company that shows [generation, transmission and distribution] charges; or (2) two bills: one from the non-utility supplier that shows energy-related charges, and one from the distribution company that shows distribution-related charges…

G.L. c. 164, § 1D ("Section 1D") (emphasis added).

Accordingly, the language of Section 1D provides two, and only two, options for distribution companies to "create and send bills to retail customers," i.e., via a single bill from the distribution company or via two bills, one from a distribution company for distribution services and one from a supplier for supplier services. Under the Legislature's framework, only distribution companies are allowed to bill customers for distribution services.[2] The issue of whether suppliers might one day be authorized to bill customers for such services via a single bill was left to further consideration by the Legislature after Department recommendations, pursuant to Section 312, on whether MBIS should be subject to competition. As noted previously, the Department determined

[1] In order to facilitate the development of a competitive market, distribution companies are also required to offer billing services for competitive suppliers.

in its MBIS Report that billing-related services should not be subject to competition. MBIS Report at 31-32.

Thus, the Legislature has made a public-policy determination that distribution companies must continue to bill customers for distribution service and must offer competitive suppliers with the right to require that the distribution company bill services for competitive suppliers. This public-policy decision is well-grounded by legitimate concerns about public safety and information, local jobs, customer protections and the rights of local distribution companies to maintain direct customer contacts. Indeed, it is clear from the legislative history that Section 1D cannot be viewed as permissive (i.e. allowing distribution companies to offer two billing options, but not explicitly prohibiting a third option) because the Legislature explicitly considered and rejected the supplier-billing option.[3]

The legislative history of the Restructuring Act on this point is clear. On October 30, 1997, the Joint Committee on Government Relations reported out of

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(…footnote continued)

[2] Of course, distribution companies may adopt cost-effective means to produce and distribute their bills through company employees, contractors, outsourcing or a combination of resources. However, the obligation and responsibility to issue bills for distribution service to retail customers is solely with the distribution company.

[3] Although NSTAR Electric does not believe that the statutory language can fairly be interpreted as permitting the so-called third billing option, if a statute is ambiguous, one may look beyond the "four corners" of the statute to extrinsic evidence in order to determine the intent of the Legislature as to the statute's meaning. EMC Corp. v. Commissioner of Revenue, 433 Mass. 568, 744 N.E.2d 55, 57 (2001) ("statutes are to be interpreted ... in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part...."); see also Pacific Wool Growers v. Commissioner of Corps. & Taxation, 305 Mass. 197, 199, 25 N.E.2d 208 (1940), quoting Commonwealth v. Welosky, 276 Mass. 398, 401, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684, 52 S.Ct. 201, 76 L.Ed. 578 (1932).

committee a version of the Restructuring Act that would have authorized a supplier single bill. See House Bill 5080 (1997) (Attachment A). That provision survived through the engrossment of the bill in the House of Representatives. See House Bill 5117 (1997) (Attachment B). However, after the bill was sent to the Senate for concurrence, the Senate Committee on Ways and Means amended House Bill 5117 to remove the provisions authorizing a supplier single bill. See Senate Bill 2017 (1997) (Attachment C). The Senate version, which removed the supplier single-bill option, was passed by the Senate and ultimately approved by the House and enacted into law.[4] Accordingly, the legislative history behind Section 1D demonstrates clearly that the Legislature intended to prohibit suppliers from billing their customers for distribution services via a supplier single bill.

At the technical conference, the Department did not provide specific information regarding the means by which a supplier single bill could be accomplished consistent with the Restructuring Act and Department regulations. However, at the technical conference held last October, 2000 on this issue, the Department offered two proposals for discussion: (1) the distribution company would determine its bill and forward the information to the supplier; or (2) the distribution company would send its billing determinants to the supplier and have the supplier produce a bill that reflects both supplier and distribution charges. Competitive Metering, Billing and Information Services, D.T.E. 00-41 (October 31, 2000 Transcript at 73-74). Neither of these "re-

[4] The legislative history of the Restructuring Act from October 30, 1997 through enactment is provided as Attachment D.

billing" proposals can be read as consistent with Section 1D without ignoring the clear intent of the Legislature. Section 1D requires distribution companies to send distribution bills "to retail customers." Sending bills or billing information to suppliers so that suppliers can prepare a single bill violates both the spirit and letter of the law.

It should be noted that within this existing regulatory framework, distribution companies have, in the past, attempted to accommodate reasonable customer requests to send bills to a location other than the address where the customer of record takes service. For instance, at a customer's request, bills for residential service have been forwarded to: (1) a customer's primary residence, where service is taken at the customer's second home; (2) a customer's relative, when, e.g., a customer may be incapable of paying bills because of illness; (3) a customer's accountant; or (4) a customer's legal representative. In these types of circumstances, although the customer bill is sent to an alternative address, the distribution company's accommodation of a customer's billing request does not circumvent the Restructuring Act's prohibition against supplier billing of distribution service. The relative or accountant is not taking the distribution company's billing determinants, recomputing the distribution bill and combining it with supplier services to create a combined electric bill. These customer-designated representatives receive the same bills that the distribution company would otherwise send directly to a customer, including Department-mandated messages and bill inserts. Moreover, such representatives have no interest in providing energy-related services to the customer, but rather, merely supply payment of a bill to the company on a customer's behalf. Finally, these limited variations on a distribution company's traditional billing procedures do not

adversely affect company staffing levels, and thus, allow customer service to be maintained.

Accordingly, the Legislature has foreclosed, as a matter of public policy, the option of suppliers billing for distribution services and generation services via a single bill. The Legislature has determined that distribution companies should not be precluded from maintaining their direct billing relationship with customers, and the Department may not lawfully implement supplier billing of distribution service in the absence of a statutory change.

III. CHANGES TO THE DEPARTMENT'S PAYMENT ALLOCATION HIERARCHY CAN BE ACCOMPLISHED WITHOUT ADVERSELY AFFECTING DISTRIBUTION COMPANIES OR CUSTOMER PROTECTIONS

At the June 7, 2001 Technical Conference, the Department sought comments on issues regarding modification of its partial payment rules established in Terms and Conditions, D.P.U./D.T.E. 97-65 for single-billing of distribution and competitive supplier services. The Department's Model Terms and Conditions for Competitive Suppliers states that, if a customer pays a distribution company less than the full amount billed, the distribution company shall apply the payment first to distribution service and, if any amount remains, then to generation service. Id. at 126 (Attachment II). A proposal raised at the Technical Conference would alter this payment hierarchy so that a partial payment by a customer would be applied in the following order: (1) to distribution company arrears, if any; (2) to supplier arrears, if any; (3) to distribution company current charges; and (4) to supplier current charges (the "Proposed Payment Hierarchy") (Tr. 111). In addition, suppliers requested that the Department consider further changing

the payment hierarchy to require partial payments to be applied to bills on a pro-rata basis, based on the percentage of a customer's bill that is attributable to generation service (Tr. at 121-122) (the "Pro-Rata Payment Proposal").

The partial payment options outlined at the technical conference may be illustrated with the following example: A customer's bill for electric service is $150, consisting of $20 in current distribution charges, $30 in current supplier charges, $40 in arrears owed to the distribution company and $60 in arrears owed to the supplier. If the customer pays $50 toward his $150 electric bill, the partial payment proposals would apply that amount as follows:

- ➢ Under the current partial-payment rules, the $50 would be applied entirely to the distribution company's charges, so that the customer's arrearage to the distribution company of $40 would be paid off and the additional $10 would be applied to the customer's current distribution charge.

- ➢ Under the Proposed Payment Hierarchy, $40 of the customer's $50 payment would be applied to the customer's distribution arrearage and the extra $10 would be paid to the supplier to be applied toward the supplier arrearage.

- ➢ Under the Pro-Rata Payment Proposal, the customer's $50 payment would be applied on a 40/60[5] basis to the customer's distribution/supplier arrearages, so that the distribution company would receive $20 and the supplier would receive $30.

A significant difference among the three options relates to the potential for the termination of distribution service because of non-payment of tariffed distribution rates. See, e.g., 220 C.M.R. 25.02(3). Under the first two options, the customer's partial

[5] It is not clear from the supplier proposal precisely how the proration is accomplished. In this example, however, both the current amounts and the arrearages are 40 percent attributable to distribution service and 60 percent to supplier service.

payment has completely satisfied the arrearage for distribution service and thus the customer is not subject to possible shut-off. Under the Pro-Rata Payment Proposal, the customer's arrearage for distribution service would not be paid and, therefore, the customer would be subject to possible distribution service termination. In fact, under the third option, the allocation of payments on a pro-rata basis means that the distribution arrearage is never fully paid until the competitive supplier arrearage is also completely eliminated. Accordingly, under the Pro-Rata Proposal, the threat of termination applies to the non-payment of the supplier portion of the bill.

In order to facilitate payments to suppliers and promote a viable competitive supplier market, NSTAR Electric does not oppose the Proposed Payment Hierarchy.[6] However, the Department should not approve the Pro-Rata Payment Proposal because, as described above, it increases the likelihood that customers that fall behind significantly in their payments to the distribution company will be shut off more quickly (see also Tr. at 125, 128).[7] In light of options available to suppliers to protect themselves from customers that fall significantly behind in payments, e.g., contract termination (D.P.U./D.T.E. 97-65, at 54), a more reasonable means of allowing suppliers to receive payment for their services is to adopt the Proposed Payment Hierarchy and thus allow

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[6] It should be noted, however, that NSTAR Electric has recently completed a comprehensive update of its billing systems and does not expect to undertake a further update of such systems for some months. Accordingly, if the Department approves the Proposed Payment Hierarchy, NSTAR Electric would update its billing systems to accommodate the new payment proposal in the normal course, i.e., during its next update of the billing system.

[7] A question remains whether, under the suppliers' Pro-Rata Payment Proposal, customers could apply their payments only to the distribution portion of their bill, in order to avoid shut-off. According to testimony from one of the suppliers, this may be allowed in New York (Tr. at 170).

suppliers to collect their arrearage more quickly than is currently allowed under the Department's existing partial-payment rules.

IV. THE DEPARTMENT SHOULD ALLOW DISTRIBUTON COMPANIES AND SUPPLIERS TO ENTER INTO AGREEMENTS FOR THE PURCHASE OF RECEIVABLES ON A CASE-BY-CASE BASIS

Suppliers at the Technical Conference proposed for consideration the option of allowing distribution companies to purchase the receivables of suppliers (Tr. at 162-179). Under this proposal, it appears that a distribution company would purchase[8] a supplier's receivables at a discount (Tr. at 162). NSTAR Electric does not oppose the suppliers' proposal in principle. However, the Department should not mandate that distribution companies take over a supplier's receivables, but rather, allow this arrangement to be implemented based on mutually agreeable commercial terms negotiated by a supplier and a distribution company. This will allow the parties to determine commercially reasonable terms for such purchase and ensure that any agreement does not implicate federal debt collection statutes, particularly the Fair Debt Collections Practices Act (the "Debt Collection Act").[9]

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[8] As noted below, it is important for legal purposes to understand whether the suppliers' proposal to "purchase" their receivables involves the distribution company taking title to such receivables, or merely being paid a fee by suppliers to manage and collect suppliers' receivables on behalf of the suppliers. The latter proposal may implicate the federal laws regarding debt-collection practices, but the former proposal does not. Therefore, it would be beneficial for the analysis of the suppliers' proposal if they provide further clarification on this point.

[9] Massachusetts law governing collection agencies and debt collecting does not focus on the business practices of debt collectors but rather, prohibits entities satisfying the definition of a collection agency or debt collector to carry on business without a license from the commissioner of banks. G.L. c. 93, § 24. However, a distribution company collecting receivables on behalf of a supplier would not appear to be subject to this licensing law because it exempts from those subject to its provisions, in pertinent part "*an agent or independent contractor employed for the purpose of collecting charges or bills owed by…a customer to a corporation subject to the supervision of*

(footnote continued…)

The Debt Collection Act includes provisions regulating how "debt collectors" may collect "debts" owed to third parties.[10] Although the Debt Collection Act regulates debt collectors, the term "debt collector" in the statute does not include (in pertinent part):

> any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was not originated by such person; (iii) *concerns a debt which was not in default at the time it was obtained by such person*; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

Id. at § 1692a(6)(F) (emphasis added).

(…footnote continued)

> *the department of telecommunications and energy…in so far as said person collects charges or bills only for such…supervised corporations.*" See id. (emphasis added). A distribution company collecting supplier receivables would appear to fit within this exemption. Although generation service provided by suppliers was deregulated pursuant to the Restructuring Act, a supplier is supervised by the Department in many areas, e.g., licensing requirements, billing regulations, customer notification and enrollment regulations and other consumer protection regulations. See G.L. c. 164, § 1F. Therefore, a distribution company would be receiving funds from customers that would be owed to companies under the supervision of the Department, i.e., suppliers. Lastly, distribution companies collecting supplier receivables are collecting such funds only on behalf of the suppliers and therefore would be collecting such receivables "only" on behalf of corporations subject to the Department's supervision. Therefore, a distribution company collecting supplier receivables would not appear to be subject to regulation by the Banking Commission as a collection agency pursuant to G.L. c. 93, § 24.

[10] The Debt Collection Act defines "debt" as:

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money…or services which are the subjection of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgement. 15 U.S.C.A. § 1692a(5).

"Debt collector" is defined as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debts, *or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another*.
>
> Id. (emphasis added).

Thus, the definition of "debt collector" exempts a person collecting a debt owed to another that is not in default "at the time it was obtained" by such person. Id.; see also Whitaker v. Ameritech Corp., 129 F.3rd 952 (C.A. 7 (Ill.)) (1997) (the court held that the Fair Debt Collection Act did not apply to Ameritech because the company was not a "debt collector" because, although Ameritech did collect money owed to long-distance companies and information providers, it did not acquire those debts after they were in default, but rather, acquired those debts at the moment each telephone call is placed in accordance with contracts with the long-distance and information providers).

Therefore, if a distribution company billed customers for supplier services from the outset of a transaction, the money owed to suppliers would not be in default at the time the "debt" was obtained, and therefore, a distribution company would not be considered a "debt collector" under the Debt Collection Act. However, in order to avoid falling under the requirements of the Debt Collection Act, it appears a distribution company could not take responsibility for collecting debts relating to supplier charges that are already in arrears at the time the distribution company obtains such receivables.

Accordingly, NSTAR Electric does not have an objection in principle to the suppliers' proposal regarding purchasing receivables. However, the terms of any agreement to purchase receivables should be left to commercial agreement between distribution companies and suppliers, and not run afoul of the Debt Collection Act.

V. CONCLUSION

The Restructuring Act does not allow suppliers to bill customers for supplier and distribution services via a single bill. Therefore, absent statutory changes, distribution companies are obligated to issue bills for distribution service to their retail customers in

order to meet the public-policy objectives established by the Legislature in the Restructuring Act. NSTAR Electric is willing to address one of the suppliers' stated obstacles to succeeding in the market, i.e., payment order, by applying payments to supplier arrears after distribution company arrears are satisfied. The Department, however, should not approve a pro-rata payment system because of the increased potential for customer shut-offs. NSTAR Electric is also willing to purchase accounts receivables from competitive suppliers on mutually agreeable terms.

Respectfully submitted,

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ATTACHMENT A

Excerpt from H 5080

(as reported by the Joint Committee on Government Regulations, October 30, 1997)

Section 1D. Beginning January 1, 1998, all electric bills sent to a retail customer shall be unbundled to separately reflect the rates charged for generation, transmission, and distribution services, as well as any other charges, as added pursuant to any provision of law, contained in the total retail price. Any transition charge, if so allowed to be assessed, shall be reflected separately on bills as of March 1, 1998. Electric bills may reflect the total costs of services, without breakdown for type of service, in addition to, but not instead of, separately itemized rates for generation, transmission, and distribution services and transition charges as of March 1, 1998. *In order to promote customer choice and convenience in a restructured electricity market, distribution companies shall allow access to the following billing options: (1) single bill from a non-utility supplier that shows energy and distribution charges; (2) single bill from the distribution company that shows such charges; or (3) two bills: one from the non-utility supplier that shows energy-related charges, and one from the distribution company that shows distribution-related charges.* Costs for such inserts shall be apportioned accordingly between the parties. The department is hereby authorized and directed to determine whether any additional information shall be required to be disclosed on the bills and to promulgate rules and regulations to implement the provisions of this subsection.

(emphasis added)

ATTACHMENT B

Excerpt of H 5117

(engrossed in the House, November 10, 1997)

Section 1D. Beginning January 1, 1998, all electric and gas bills sent to a retail customer shall be unbundled to separately reflect the rates charged for generation, transmission, and distribution services, as well as any other charges, as added pursuant to any provision of law, contained in the total retail price. Any transition charge, if so allowed to be assessed, shall be reflected separately on bills as of March 1, 1998. Electric and gas bills may reflect the total costs of services, without breakdown for type of service, in addition to, but not instead of, separately itemized rates for generation, transmission, and distribution services and transition charges as of March 1, 1998. *Not later than six months after said March 1, in order to promote customer choice and convenience in a restructured electricity and gas market, distribution companies shall allow access to the following billing options: (1) single bill from a non-utility supplier that shows energy and distribution charges; (2) single bill from the distribution company that shows such charges; or (3) two bills: one from the non-utility supplier that shows energy-related charges, and one from the distribution company that shows distribution-related charges.* Costs for such inserts shall be apportioned accordingly between the parties. The department is hereby authorized and directed to determine whether any additional information shall be required to be disclosed on the bills and to promulgate rules and regulations to implement the provisions of this subsection.

(emphasis added)

ATTACHMENT C

Excerpt from S 2017 (S 2025, as amended)

(engrossed in the Senate, November 17, 1997)

SECTION 1D. Beginning January 1, 1998, all electric and gas bills sent to a retail customer shall be unbundled to separately reflect the rates charged for generation, transmission, and distribution services, as well as any other charges, as added pursuant to any provision of law, contained in the total retail price. Any transition charge, if so allowed to be assessed, shall be reflected separately on bills as of March 1, 1998. Electric and gas bills may reflect the total costs of services, without breakdown for type of service, in addition to, but not instead of, separately itemized rates for generation, transmission, and distribution services and transition charges as of March 1, 1998. *Not later than six months after said March 1, in order to promote customer choice and convenience in a restructured electricity and gas market, distribution companies shall allow access through the distribution company to the following billing options: (1) single bill from the distribution company that shows such charges; or (2) two bills: one from the non-utility supplier that shows energy-related charges, and one from the distribution company that shows distribution-related charges.* Costs for such inserts shall be apportioned accordingly between the parties. The department is hereby authorized and directed to determine whether any additional information shall be required to be disclosed on the bills and to promulgate rules and regulations to implement the provisions of this subsection.

(emphasis added)

ATTACHMENT D

[NOT INCLUDED IN ELECTRONIC VERSION]